In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Original.]No. —

EX PARTE: IN THE MATTER OF EDGAR DEBARA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Section 5480 of the Revised Statutes, which prohibits and punishes any use of the mails of the United States for fraudulent purposes, provides the following penalty for each violation:

> Such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but

> the court thereupon shall give a single sentence and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

It appears from the application (p. 12) that on May 5, 1899, an indictment was returned against Edgar De Bara and Fannie DeBara, which charged in three counts three separate violations of the above section. This indictment was in cause No. 3012.

A number of other indictments, under the same section, were found against these persons, and on June 1, 1899, in the presence of the defendants and with their consent, it was agreed that causes 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, and 3017 should be consolidated and tried with "this cause" (being cause 3012) and by the same jury. All these causes were accordingly consolidated. (Application, p. 19.)

The indictments, other than that in cause No. 3012, are not set forth in the application, but my information is that they were under the same section, for similar offenses, and each contained three counts.

After a trial had upon these consolidated indictments, the jury, on June 5, 1899, rendered the following verdict (Application, p. 22):

> We, the jury, find the defendants, Edgar De Bara and Fannie De Bara, guilty as charged in indictments 3009–3012–3015– and all the counts therein. We also find the defendants, Edgar De Bara and Fannie De Bara, guilty in counts two and three as charged in indictments Nos. 3007–3008–3010–3011–3013–3014–3016–3017.

On the 17th of June, 1899, a nolle prosequi was entered as to the first count in each indictment in causes 3007, 3008, 3010, 3013, 3014, 3016, and 3017 (Application, p. 23).

On the same day the following judgment was pronounced (Application, p. 25):

> Come the parties by their attorney, and the defendant in his own proper person, in the custody of the marshal, to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, A. D. 1899, one of the days of this term of this court, been found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar DeBara, be confined and imprisoned in the house of correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years.

It does not clearly appear whether the court, in thus passing sentence, predicated its action upon a conviction had under the indictment in cause No. 3012, or upon the conviction upon all the indictments.

I understand counsel for the petitioner to contend that the sentence was based upon the indictment in cause No. 3012 alone.

Before eighteen months of his sentence expired DeBara made application to the district court for a writ of habeas corpus, claiming the entire sentence was null and void. This application was denied, and upon appeal to the circuit court of appeals the action of the lower court was affirmed. The opinion of Judge Day (the court being composed of Judges Taft, Lurton, and Day) is to be found in 99 Federal Reporter, page 942.

The court held that in any view of the case the application was made too soon. That in any view the sentence was not void but excessive, and whether it was excessive or not could not be determined upon habeas corpus until the portion clearly valid had been served. At the same time the court refrained from expressing any opinion as to the question now raised, saying (p. 947):

> We have already seen that it is within the power of the court, in any aspect of the case, to impose a sentence upon the prisoner of eighteen months. This much of the sentence the prisoner has not yet served. We do not undertake to determine herein what may be the rights of the prisoner at the expiration of the term of eighteen months, nor do we wish to be considered as in any wise foreshadowing the views which the court may hold as to his rights, should further application for the writ be made at that time.

ARGUMENT.

I.

Section 754 of the Revised Statutes provides that an application for a writ of habeas corpus shall be made in writing signed by the person for whose relief it is intended

and verified on oath. If it is not signed and sworn to by the person for whose relief it is intended, a sufficient reason must be shown, and no sufficient reason is shown in this case. The only reason given is that the man is in prison. But that reason would apply to practically every case, and nullify the provision of the statute which I have quoted.

Church on Habeas Corpus (section 89, note 3) says:

> One making an application for the writ of habeas corpus *ad subjiciendum* must, if he apply for or on behalf of another, make an affidavit of authority, or show that there is such restraint that it can not be given.

In *Ex Parte Hibbs* (26 Fed. Rep., 421) Judge Deady says (p. 435):

> I also think it proper to call attention to the fact that the application for this writ was not made and verified by the prisoner, as required by section 745 of the Revised Statutes.

II.

If the court shall be of opinion that the sentence was restricted to the indictment in cause No. 3012, the question to be determined is whether, in view of the conviction on the three counts charging three separate and distinct offenses, the court was or was not restricted to the punishment provided for a single offense. The punishment prescribed by the statute is "imprisonment for not more than eighteen months." This is the punishment for one offense. At the same time the statute provides that the indictment may severally charge offenses to the number of three when committed within the same

six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Does the phrase "a single sentence" mean a sentence restricted to the punishment provided for a single offense, or does it mean a sentence restricted to the punishment which may, under the statute, be imposed for three separate and distinct offenses? "A single sentence" must be imposed, although the prisoner is convicted of three separate offenses, and in this "single sentence" the court is required to "proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device." This would seem to confer upon the court a discretion additional to that conferred by the preceding portion of the section.

Under section 1024 separate offenses growing out of the same transaction may be charged in one indictment, and separate indictments found under such circumstances may be consolidated.

What was the purpose of the special authority given in the statute under consideration and the additional discretion conferred if not to permit the imposition in one sentence of the maximum punishment provided for the three separate offenses in case the court believed the character of the crime demanded it.

In the case of *In re Henry* (123 U. S., 372), Chief Justice Waite, speaking for the court, said, respecting the statute under discussion (p. 373):

> Under the present statute three separate offenses, committed in the same six months, may be joined, but not more, and when joined there is to be a single sentence for all. *That is the whole scope and meaning of the provision, and there is nothing whatever in it to indicate an intention to make a single continuous offense, and punishable only as such, out of what, without it, would have been several distinct offenses, each complete in itself.*

And yet, if three separate offenses are joined in one indictment, and a single sentence must be imposed, and this sentence restricted to the punishment for one sentence, the effect, so far as the prisoner is concerned, *is to merge his three offenses into one and punish him only for one, although found guilty of three.*

The act authorizing the joinder of offenses in one indictment, said the court in *Ex parte Hibbs* (26 Fed. Rep., 426)—

> was intended to promote the speedy and economical administration of justice in such cases, in the interest both of the Government and the defendant, *and not practically to merge two or more distinct offenses into one, for the benefit of the latter.* Nor is there any reason why a party who has committed two distinct offenses, which for the convenience of the prosecution as well as the defense are joined in one indictment, *can only be punished as for one, though found guilty of both.*

III.

If, however, the court should be of the opinion that a sentence exceeding eighteen months could not be imposed under one indictment although it contained three counts

for three distinct offenses, I suggest to the court that perhaps it is worthy of consideration whether the punishment was not based upon all of the indictments that were consolidated, and was intended to be cumulative, and was simply erroneous in form, so that the case should be sent back for a re-sentence.

IV.

Counsel for the petitioner is mistaken when he says that the charges in the different counts of the different indictments were simply different ways of describing the same offense. Under this statute the offense is not, as counsel would seem to suggest, the devising of the scheme to defraud, but it is the depositing of the letter in the post-office or the taking of the letter therefrom. Each such act is a distinct offense. (*In re Henry*, 123 U. S., 372, 374.)

The case is an important one. The scheme to defraud was extensive. The DeBaras made many thousand dollars by working it. A great many people, especially in England, were defrauded. The Government was put to great expense to prove the case, witnesses being brought from abroad. The punishment the court evidently intended to inflict was light, considering the character of the crime.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 6, 1900.

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No. 15 Orig.

Return to Rule.

Filed Oct. 29, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 15, ORIGINAL.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

ON PETITION FOR WRIT OF HABEAS CORPUS.

RETURN TO RULE.

FILED OCTOBER 29, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 15, ORIGINAL.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

ON PETITION FOR WRIT OF HABEAS CORPUS.

RETURN TO RULE.

1 In the Supreme Court of the United States. No. 15, original. October term, 1900.

EX PARTE: IN THE MATTER OF EDGAR DE BARA, PETITIONER.

I, John L. McDonell, hereby certify and make return to the rule to show cause why a writ of habeas corpus should not issue as prayed in the petition of the above-named petitioner; that I am superintendent of the House of Correction at Detroit, Michigan, and that I now hold the above-named petitioner in my custody as such superintendent by virtue of a certain certified copy of the judgment and sentence of the district court of the United States for the northern district of Illinois, northern division, dated June 17, 1899, a certified copy of which is hereto attached, wherein it was ordered that the above-named petitioner be confined and imprisoned in the said House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years, which period of three years has not yet elapsed.

JOHN L. MCDONELL,
Superintendent of the House of Correction at Detroit, Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On this 23rd day of October, in the year of our Lord one thousand and nine hundred, before me, an United States Commissioner for the eastern district of Michigan, personally appeared John L. McDonell, to me known to be the person who signed the foregoing instrument and return, and who, being by me first duly sworn, says that said instrument and return is true of his own knowledge.

[SEAL.] JOHN GRAVES,
United States Commissioner for the Eastern District of Michigan.

2 SATURDAY, *June 17, A. D. 1899.*

The district court of the United States for the northern division of the northern district of Illinois met at nine o'clock a. m., pursuant to adjournment.

Present: The Hon. Christian C. Kohlsaat, judge of said court, presiding; the clerk, and marshal.

THE UNITED STATES *vs.* EDGAR DE BARA. } 3012, § 5480 vio. postal laws.

Come the parties by their attorneys, and the defendant in his own proper person in custody of the marshal to have the sentence and judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June A. D. 1899, one of the days of this term of this court, being found guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him, and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the House of Correction at Detroit, Michigan, in the State of Michigan, for and during a period of three years.

3 In the district court of the United States of America for the northern district of Illinois, northern division.

I, T. C. MacMillan, clerk of the district court of the United States of America, for the northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the sentence and judgment had and entered of record in said court on the seventeenth day of June, A. D. 1899, in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-second day of October, A. D. 1900.

[SEAL.] T. C. MACMILLAN, *Clerk.*

4 (Indorsed:) File No. . Supreme Court U. S., October term, 1900. Term No. 15. Origl. Ex parte in the matter of Edgar De Bara, petitioner. Return to rule filed Oct. 29, 1900.

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